

There is no evidence that the plaintiff has been substantially obstructed by these activities.

The plaintiff purchased Lots 111³² and 111³³ in March, 1973, for development. There is a dwelling house on Lot 111³² and a dwelling house on Lot 111³³. These two houses are unoccupied. According to the plaintiff a gardener cum watchman lives in one of these houses and sometimes the plaintiff's guests stay in that house and the director's family made use of one of the houses at weekends. I do not accept Tan Eng Khuay's evidence that the plaintiff inspected the houses daily and made use of the right of way almost daily.

Ching Mun Fong, a director of the plaintiff Co. said in evidence that the activities carried out by the defendant on the right of way had blocked her path and she could not get to the plaintiff's house and that that happened in June, July, August, September, October and December, 1974. She agreed that that was when the Public Works Department were digging the trenches. I do not accept her evidence that she could not get to the plaintiff's house.

I inspected the right of way on the October 21, 1975, during the course of the hearing and I found that the road on Lot 111³¹ was in fairly good condition and there was no difficulty for the plaintiff to get to the houses on Lots 111³² and 111³³.

Access to Grange Heights is now at two points — River Valley Road and St. Thomas Walk. As from March, 1975, Lot 111³¹ as an access road is excluded from the defendant's development. Even if Lot 111³¹ is used as an access road it is highly improbable that vehicular traffic from Grange Heights along the right of way would be so heavy as to substantially interfere with the plaintiff's enjoyment of the right of way.

I find that there has been no substantial interference of the plaintiff's enjoyment of the right of way and consequently the plaintiff has no cause of action against the defendant.

In the result the plaintiff's claim is dismissed with costs.

I now come to deal with the counterclaim of the defendant. The short answer to the counterclaim is that this is a counterclaim against the plaintiff, who is not the owner of Lot 111³¹, the servient tenement, and in my view the defendant cannot get the declarations that it is seeking against the plaintiff.

The counterclaim of the defendant is dismissed with costs.

Order accordingly.

Solicitors: *Lee & Co.; Yap & Yap.*

A MALAYSIAN REPORTS

EASTERN MINING & METALS CO. SDN. BHD. v. M.M. ISMAIL & ORS.

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.)
November 21, 1975]

[Kota Bharu — Federal Court Civil Appeal No. 86 of 1974]

B *Industrial Law — Termination of service by giving four days' notice — Employee entitled to two months' notice or two months' salary in lieu — Collective agreement giving retrenchment benefits — Employee not a member of trade union — Employee given and accepting benefits under collective agreement — Whether entitled to claim two months' salary under service agreement.*

C The respondent had his services terminated by the appellant, who gave only four days' notice. Under the terms of his employment he was entitled to two months' notice or two months' salary in lieu. The respondent was in fact given retrenchment benefits under the terms of a collective agreement between the appellants and the trade union. The respondent was not a member of the trade union but he accepted the retrenchment benefits which were more than two months' salary. Subsequently he sued for payment of the two months' salary in lieu of notice. Judgment was given for him in the Magistrate's Court and on appeal this was affirmed by the High Court. The appellant appealed to the Federal Court.

D *Held*, allowing the appeal: as the respondent had accepted the greater benefits under the collective agreement he could not at the same time claim the lesser benefits under his individual term of employment.

Case referred to:-

E (1) *Lissenden v. C.A.V. Bosch Ltd.* [1940] A.C. 412.

FEDERAL COURT.

D. Puthucherry for the appellant.

A. Gomez for the respondent.

F *Suffian L.P.* (read by *Wan Suleiman F.J.*): M.M. Ismail the plaintiff was employed by EMMCO the defendant as a Railway Inspector. The plaintiff did not belong to a union. His salary and conditions of service were contained in a letter of appointment dated February 26, 1968, Exhibit P1 at page 41 of the appeal record.

Clause 10 of the letter of appointment headed "Termination" reads as follows:—

G "10. Either party may terminate the appointment at any time by giving two months' notice in writing. Alternatively, the company may terminate the appointment at any time on giving two months' pay in lieu of notice."

Then there is clause 7 headed "Medical Benefits". It reads as follows:—

H "7. You will be entitled to medical benefits in accordance with Part III of the terms and conditions of employment for monthly-paid staff."

The terms and conditions of employment referred to in clause 7 were embodied in a collective agreement (Exhibit D10 at page 54) between the defendant company and a union of some of its employees, of which union the plaintiff is not a member.

I Part III of that agreement is headed "Medical Benefits."

Section 1(g)(i) of that part reads:—

"(g) (i) Any employee who, after a minimum of five years continuous and good service is retired or retrenched by the company shall be entitled to the same benefits as laid down in paragraph (f) above."

Paragraph (f) reads:

"(f) If, in the opinion of the company's medical officer, an employee is medically unfit to continue to be employed by the company, he/she shall be paid two months' salary (in lieu of notice) and two weeks' pay for each year of continuous service over one year. The rates shall be based on the salary at the time of termination of service."

I would have thought that paragraph (g)(i) has nothing to do with medical benefits (it deals with retirement or retrenchment benefits) and that therefore it does not apply for the benefit of the plaintiff, but the defendant says that it does and I would therefore proceed on the basis that it does, because the benefits to the plaintiff under it were greater than those under P1.

The defendant company mined iron. Because its ore reserves were exhausted, the company decided to close down. So by letter dated January 21, 1971 (Exhibit P2 at page 45), the company gave four days' notice to terminate the plaintiff's service under clause 10 of Exhibit P1 with effect from January 25, 1971, that is short of the two months' notice which the company was required to give under that clause. Therefore under that clause the company should have paid the plaintiff two months' pay in lieu of notice.

The plaintiff thereupon sued the company in the Magistrate's Court at Kuala Trengganu. In his statement of claim he said that the company in breach of his terms of employment terminated his service by giving him only four days' notice, that he was entitled to two months' notice or two months' salary in lieu, that therefore he prayed for an order that the company give him two months' salary in lieu, and damages for breach of contract, and other relief.

In its defence the company admitted that the plaintiff was given only four days' notice and entitled to two months' salary in lieu, but contended that it did pay the plaintiff two months' salary in lieu of notice, that before so paying it gave the plaintiff a statement of final emoluments due to him, that the plaintiff confirmed and agreed the amount of final emoluments due to him, and that over and above what was legally due to the plaintiff the company gave the plaintiff one month's salary as *ex-gratia* payment.

The learned magistrate gave judgment for the plaintiff, holding that:

- (1) the company failed to give the plaintiff the two months' notice required;
- (2) the statement of final emoluments did not show that two months' salary in lieu of notice had been paid to the plaintiff; and
- (3) the collective agreement D10 did not apply to the plaintiff and that therefore its Part III cannot be relied upon by the company to suggest that two months' salary had been paid in lieu of notice.

The company appealed to the High Court, contending that the learned magistrate was wrong in —

- (1) failing to note that the statement of final emoluments included two months' salary in lieu of notice; and
- (2) in holding that Part III of the collective agreement did not apply to the plaintiff.

A The learned appellate judge dismissed the appeal, that is he decided in favour of the plaintiff. He held contrary to the argument of counsel for the company that the principle of approbation and reprobation (*Lissenden v. C.A.V. Bosch Ltd.*)⁽¹⁾ did not apply, for he said that it was clear that the right to two months' salary in lieu of notice was expressly provided for in the letter of appointment (P1). He held that the collective agreement (D10) did not apply to the plaintiff, that the retrenchment benefits received by the plaintiff were *ex-gratia* payments and by accepting them the plaintiff had not waived his contractual right under his letter of appointment (P1), and that there was no evidence that the company ever asked the plaintiff to waive his right under P1 before accepting retrenchment benefits under D10.

C It was not disputed however that the money paid to the plaintiff was much more than two months' salary, but the learned judge did not agree that merely because those two months' salary appeared in the statement of retrenchment benefits therefore that was salary in lieu of notice. The company has appealed to us.

- D It contends the appellate judge was wrong —
- (1) in holding that the company was not bound to pay the plaintiff in accordance with the collective agreement (D10);
 - (2) in failing to distinguish between termination *per se* and termination by reason of retrenchment; and
- E (3) in holding that the principle of approbation and reprobation did not apply in this case.

With respect I think that the justice of the case is on the company's side. I would prefer to so decide in the following simple way.

F Notice to terminate by the company is only one act. That act has the effect of terminating plaintiff's service. This single act may however be (a) termination pure and simple or as stated by counsel for the company termination *per se*, or (b) termination by reason of retrenchment. If it is only the first, then all the plaintiff is entitled to will be two months' pay in lieu of notice under P1. If it is the second, then he is entitled to the retrenchment benefits set out in the collective agreement (D10). But he says that he is entitled to benefits under both P1 and D10. The company on the other hand in effect contends that his benefits under P1 are distinct from his benefits under D10, that his benefits under P1 are merged in his benefits under D10 that if he has accepted the greater benefits under D10 he cannot at the same time claim the lesser benefits under P1. With respect I agree. If the intention of the parties in circumstances such as these had been to benefit the plaintiff both under P1 and D10, I would have expected much clearer language to have been used in either or both documents. That is not the case here.

H I The complaint of the plaintiff amounts to this. His service was terminated. In accordance with his contract of service the company was to pay him out of its right pocket, but instead it elected to pay him out of its left pocket. He insists that the company should also pay him out of its right pocket, notwithstanding that the amount already received by him from the left pocket is more than what he would have re-

ceived from the right pocket. My answer to that is that in the circumstances of this case, he cannot claim to be paid out of both pockets. His service was terminated by virtue of retrenchment and his compensation is governed by the collective agreement. Had his service been terminated otherwise than by virtue of retrenchment, his compensation would have been governed by P1 alone and all he would have been entitled to would have been two months' pay. In the event he got more than that.

I would therefore allow the appeal with costs both here and in the courts below.

Such is my judgment in the case brought by M.M. Ismail. But as stated by my brother Wan Suleiman F.J. there were similar cases brought by others, the outcome of which depends on the result of Ismail's case.

Wan Suleiman F.J.: This is an appeal from the order of the High Court Trengganu where an appeal by the present appellant company against a decision of the Magistrate, Kuala Trengganu was dismissed.

Nine separate actions had been brought by different plaintiffs against the appellant company and as these are identical in nature the parties have agreed that all actions will abide the decision of the present action.

The plaintiffs/respondents were appointed by the appellant company in various capacities, the individual Letters of Appointment which set out the terms thereof being Exhibits P1, P11A, P12A, P13A, P14A, P15A, P16A, P17A and P18A. We need concern ourselves only with that clause in the various Letters of Appointment which relates to Termination of Service. In some that clause is Clause 9 and in others Clause 10, and all are identically worded thus:

"Either party may terminate the appointment at any time by giving two months notice in writing. Alternatively, the company may terminate the appointment at any time on giving two months' pay in lieu of notice."

Due to exhaustion of the company's ore reserves, it decided to close down its mine, and as a consequence notices of termination of service were sent out to its employees. All such notices fell short of the requisite two months. For instance PW1 was only given 4 days' notice.

It is not disputed that the plaintiffs are not members of the East Coast Mining Industry Workers' Union (see Exhibit P5).

The terms of service of all other monthly paid employees who unlike plaintiffs were not covered by individual contracts of service were by agreement between the Company and the Union, contained in the Agreement Exhibit D10. The only thing in common between Agreement Exhibit D10 and the individual Letters of Appointment is a clause in the latter extending certain provision in the former agreement to the latter.

In the case of PW1's Letter of Appointment for example, such extension appears in Clause 7, under the heading "Medical Benefits" and is as follows:

A "7. You will be entitled to *medical benefits* in accordance with Part III of the terms and conditions of employment for monthly-paid staff."

One would be forgiven in wondering if only the purely medical benefits set out in Part III of the Agreement Exhibit D10 were meant to be extended to the plaintiffs.

B Paragraphs (a), (b), (c), (d), (e) and (f) are without doubt medical benefits, as is (h), but paragraph (g) deals with retiring (and retrenchment) benefits of employees who have served for at least a certain length of time.

C The individual agreements signed by plaintiffs, such as Exhibit P1 contain no provision for retirement (or retrenchment) benefits and, though such benefits seem to be out of place in a provision dealing with medical benefits, it would be reasonable to assume that the company intended to extend these benefits, as well as the purely medical ones, when referring to "medical benefits in accordance with Part III of the terms and conditions of employment for monthly-paid staff" in Clause 7 of Exhibit P1.

D In paragraph 5 of the Statement of Claim PW1 claimed that the company had "unlawfully and in breach of the terms of employment terminated his services without adequate notice" and prayed for damages for such breach in addition to the 2 months' salary in lieu of notice.

E The company elected not to call evidence.

F The issue before the learned Magistrate boils down to the question of whether the plaintiffs are entitled to 2 months' salary in lieu of notice under Clause 10 of Exhibit P1 *as well as* an additional 2 months' salary in lieu of notice and the other payments, as the plaintiffs/respondents would have it, or only the latter payments in the case of a retrenched employee, as is the contention of appellant company.

G The learned Magistrate held that since plaintiffs were not members of the union and were covered by individual agreements, the Agreement Exhibit D10 had no application to them so that, to quote his judgment "the provision at page 4 Part III paragraph (g)(i) of the said Agreement cannot be invoked to suggest that 2 months' salary appeared at 1st year on the Statement of Retrenchment Benefits had been paid in lieu of notice", and gave judgment for plaintiffs.

H It should be noted that no damages were awarded in respect of the prayer for alleged breach of contract. It is also not in dispute that the sums of money paid to the plaintiffs were much higher than the 2 months' salary in lieu of notice they would have received under clause 10 of the individual Letter of Appointment Exhibit P1.

I Before the High Court, the appellant company contended that the plaintiffs/respondents, having accepted the retrenchment benefits, were therefore precluded from claiming the 2 months' pay in lieu of notice, and argued that the principle of approbation and reprobation applied.

The learned judge considered the case of *Lissenden v. C.A.V. Bosch Limited*⁽¹⁾ where this principle was

exhaustively examined, and took the view that that principle did not apply in this case, since he considered it clear that the right to two months' salary in lieu of notice is expressly stated in the Letters of Appointment.

He regarded the retrenchment benefits as being at the most *ex gratia* payments and that the plaintiffs/respondents could therefore not be held to have waived their contractual rights under their Letters of Appointment, or discharged the appellant company from their obligations thereunder. The learned judge added that there was no evidence that the appellant company had either asked the plaintiffs/respondents to elect or of their agreement to waive their rights if they accepted the retrenchment benefits. Accordingly he dismissed the appeal.

It seems to me, as I have said before that paragraph (g) of Part III of the Agreement Exhibit D10 merely extended to the plaintiffs what was lacking in their individual agreement. Whilst signatories of individual agreements who had served the company for less than five years would merely be entitled under Clause 10 to 2 months' notice or 2 months' pay in lieu of notice, those who had a minimum of 5 years "continuous and good service", on being retired or retrenched would under paragraph (g)(i) of Part III of Exhibit D10 be entitled (not merely as a payment *ex gratia*) to two months' notice, or in lieu thereof 2 months' pay and two weeks' pay for each year of continuous service over one year.

The term "termination of service" is clearly, in this context, being used synonymously with "retire" or "retrench", so that there is no question of the plaintiffs being entitled both to the payment under Clause 10 in addition to those under paragraph (g)(i) of Part III. ("Retrenchment" in The Shorter Oxford English Dictionary is defined as "curtailment", "limitation" or "reduction"). An employee found medically unfit under paragraph (f) of Part III, I think, will be "retired" in normal parlance. In the same paragraph the term "termination of service" appears, as it subsequently appears in paragraph (g)(ii) again in connection with employees retiring on reaching the retirement age of 55 years.

It is therefore not a question of a double entitlement on the part of the plaintiffs, but one of which category such payment would fall under, and I would with respect say that the plaintiffs received payment in the proper category. Indeed Exhibit P4 will show that they received more than they were entitled to — having also received salary for annual leave due and one month's salary *ex gratia*.

I would therefore allow this appeal with costs here and in the court below.

Raja Azlan Shah F.J. concurred.

Appeal allowed.

Solicitors: Skrine & Co.; Mohamed Yaacob & Gomez.

A UNITED MALAYAN BANKING CORPORATION BHD. v. GOH TUAN LAYE & ORS.

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.J.J.)
November 28, 1975]

[Kota Bharu — Federal Court Civil Appeal No. 56 of 1974]

Land Law — Deposit of title deeds with bank to secure overdraft — Owner subsequently agreeing to sell land to respondent — Judgment in default obtained by bank against owner — Writ of seizure and sale and prohibitory orders obtained — Intervention by the purchasers — Application by interveners to set aside prohibitory orders — No caveat entered against the lands — Priorities — First in time entitled to priority, other things being equal — Kelantan Land Settlement Ordinance 1955, s. 3(2) — National Land Code, s. 206.

The appellants had given an overdraft to a firm and to secure the overdraft three partners of the firm deposited with the appellants documents of title relating to their lands. They did not caveat the lands as they were prohibited by the Kelantan Land Settlement Ordinance, 1955 from so doing. Subsequently the owner of the land agreed to sell the lands to the respondents, who paid the purchase price in full. No caveat was entered by them. The appellants obtained judgment in default against the firm and subsequently obtained a writ of seizure and sale and prohibitory orders relating to the lands. The respondents intervened and applied to set aside the prohibitory orders. The learned trial judge set aside the prohibitory orders on the ground that on the date of those orders the respondents had paid the full purchase price for the lands, that the owners were then only trustees of the land on behalf of the respondents, the owners had no beneficial interest in the lands and they had therefore nothing to be seized by their creditors, the appellants. The appellants appealed to the Federal Court.

E Held, allowing the appeal: (1) at the time when the respondent became equitable owners of the lands which was later in time than when the documents of title were deposited with the appellants, there were two parties with equitable interests, all interests being unregistered and unprotected by caveats;

(2) in these circumstances, the appellants were entitled to priority, other things being equal;

F (3) the appellants had not been guilty of any act or omission which had or might have the effect of inducing the respondents to act to their prejudice and therefore they should have priority over the respondent's equitable interest.

Cases referred to:-

(1) *Karupiah Chettiar v. Subramaniam* [1971] 2 M.L.J. 116.

(2) *Butler v. Fairclough* 23 C.L.R. 78, 91.

G (3) *Abigail v. Lapin* [1934] A.C. 491, 501.

FEDERAL COURT.

Raja Abdul Aziz bin Raja Addruse (Mohamed Dzaidin bin Abdullah with him) for the appellant.

A. Wilson for the respondent.

H Suffian L.P.: The United Malayan Banking Corporation Ltd. (plaintiff in the lower court and appellant before us) gave an overdraft to a firm, Sharikat Chin Tong (1967). To secure the overdraft, on April 27, 1968, three partners of the firm deposited with the bank documents of title relating to their lands.

The firm did not pay the whole or part of the amount of the overdraft. On April 13, 1970, the bank filed a suit against the firm in the High Court at Kota Bharu, Civil Suit No. 30 of 1970, out of which this appeal arises. The bank in their statement of claim alleged that the firm was indebted to it in a specified sum. The bank made no mention of any lien.

The firm did not appear. On January 18, 1971, the bank obtained judgment in default against the firm.